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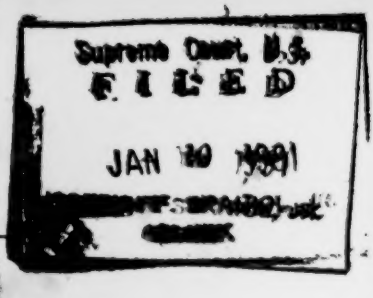

No. _____

IN THE SUPREME COURT OF
THE UNITED STATES
OCTOBER TERM, 1990

JEROME GOLOCHOWICZ,

Petitioner

vs.

HENRY GRAYSON, Warden, Charles Egeler Correctional Facility,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Petitioner Jerome Golochowicz was charged with first degree murder, but no special circumstances were listed. At the bindover the prosecutor argued premeditation. In the opening argument at trial, the prosecutor stated he was required to prove premeditation. At the end of the trial, the prosecutor moved to add a charge of felony murder in the course of a larceny, and the motion was granted over defense objection. Defendant was convicted of felony murder and acquitted of premeditated murder.

Question 1: Are premeditated murder, and felony murder in the course of a larceny, different crimes because they have different elements, or are they merely different "theories" which need not be separately charged?

Question 2: Do the due process right to notice of the charge and related due process rights require that a charge of felony murder in the course of a larceny include mention of felony murder and specification of which underlying felony is being charged, or can the prosecutor decide what elements are charged after the close of proofs?

Question 3: Did the judicial history of the case, including the first trial where only premeditated murder was instructed on, the

intervening preliminary examination where only premeditated murder was argued, and the prosecutor's opening argument at trial stating that premeditation must be proved, serve to inform the accused that he faced only premeditated murder and not murder in the course of a larceny?

Question 4: Did the trial judge's previously stated opinion about the effectiveness of the attorney require him to disqualify himself from the hearing on ineffective assistance of counsel?

Question 5: Was counsel ineffective for failing to properly prepare, for failing to allow Petitioner access to discovery, for switching his theories of defense back and forth, for releasing a confidential document which included important statements of the accused, and other shortcomings?

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IN THE SUPREME COURT OF
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OCTOBER TERM, 1990

JEROME GOLOCHOWICZ,

Petitioner

vs.

HENRY GRAYSON, Warden, Charles Egeler Correctional Facility,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Jerome Golochowicz, Petitioner, by and through his attorney, James S. Lawrence, moves this Court to issue a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit, issued October 22, 1990.

OPINIONS BELOW

Tne opinion of the Sixth Circuit Court of Appeals of October 22, 1990 is attached as Appendix A, beginning at page A1. The opinion of the United States District Court for the Eastern District of Michigan of August 31, 1989 is attached as Appendix B, beginning at page A10.

STATEMENT OF JURISDICTION

This case was filed in U.S. District Court as a Petition for Writ of Habeas Corpus for a state prisoner being held in violation of the constitution of the United States, with jurisdiction attaching under 28 U.S.C. §2254. Habeas corpus relief was denied.

The final judgment of the U.S. Court of Appeals for the Sixth Circuit affirming the District Court was entered October 22, 1990. This Court has jurisdiction to entertain a Petition for Writ of Certiorari pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Sixth Amendment to the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense."

STATUTE INVOLVED

M.C.L. 750.316 provides:

"Murder which is perpetrated by means of poison, lying in wait, or other wilful, deliberate, and premeditated killing, or which is committed in the perpetration, or attempt to perpetrate arson, criminal sexual conduct in the first or third degree, robbery, breaking and entereing of a dwelling, larceny of any kind, extortion, or kidnapping, is murder of the first degree, and shall be punished by imprisonment for life."

STATEMENT OF THE CASE

Petitioner Jerome Golochowicz is presently serving a sentence of life imprisonment in a Michigan state prison upon his conviction for first degree murder, pursuant to M.C.L. 750.316.

Petitioner was charged with "murder," and tried and convicted in circuit court of first degree premeditated murder on May 6, 1977. No charge of felony murder in the course of a larceny was made or instructed on. That conviction was reversed by the Michigan Supreme Court for evidentiary error on May 17, 1982. *People v. Golochowicz*, 413 Mich. 298 (1982).

After reversal, the case went to district court, and Petitioner was again bound over on "murder." A jury trial was then held in the Oakland County Circuit Court before the Hon. Frederick C. Ziem. At the conclusion of the trial, the court instructed not only on premeditated murder, but also on felony murder, murder committed in the course of a larceny. Petitioner was convicted of felony murder, and acquitted of premeditated murder, and was sentenced to life in prison on February 15, 1983.

A post-trial hearing was held upon remand by the Michigan Court of Appeals, regarding the issue of ineffective assistance of counsel. The hearing took place October 18, 1983 before the Hon. Frederick C.

Ziem. Judge Ziem stated prior to the hearing that Petitioner was "very capably represented by counsel." (T 3, 104).

Subsequent appeals raising the instant issues were denied in the Michigan Court of Appeals and Michigan Supreme Court. Habeas Corpus was denied in the U.S. District Court and U.S. Court of Appeals.

Donald Mitchell, a 49 year old man, was found dead on his bed in his condominium in Novi, Michigan, on November 1, 1976. The cause of death was asphyxia, caused by his being strangled with the belt from his bathrobe. (T1, 54, 162). Sperm was found in his anus. (T1, 166). No one testified to having witnessed the killing.

Numerous items of property of the deceased were found in the possession of brothers Dennis and Paul O'Clair. Numerous witnesses testified to buying items of Mitchell's property from the O'Clairs.[1]

On November 6, 1976, witness Harold Seldes, an employee of Campau Drugs in Hamtramck, Michigan, made a sale to Mr. Golochowicz, who paid by using the credit card of Mr. Mitchell. (T1, 179-182). Mr. Golochowicz made another purchase with the credit

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[1] The Court of Appeals opinion (App. 2) suggests that Petitioner was caught selling this property. In fact, it was the O'Clair's who were identified by witnesses as selling the property. Apart from the testimony of the O'Clair's, Petitioner was directly connected only to use of the credit card.

card that day, according to witness Andrea Morowski. (T1, 188-190).

Sgt. Edward Davis of the Michigan State Police testified that in the living room of Mr. Mitchell's condominium a TV Guide was found which had the fingerprint of Mr. Golochowicz. He also found a fingerprint of Mr. Golochowicz on a dish in the dishwasher. (T2, 30, 38). There was no sign of forcible entry into the condominium. (T2, 31).

Dennis O'Clair testified that Mr. Golochowicz gave him the various items of property that were later identified as Mr. Mitchell's. (T1, 194-197). According to Dennis O'Clair, Petitioner asked him for help in cashing a check, and O'Clair did so. O'Clair and Golochowicz then allegedly used the money to buy drugs which the two of them injected. They then repeated this with a second check. (T1, 199-202).

Paul O'Clair, brother of Dennis O'Clair, testified that the property of Mr. Mitchell found in his and his brother's possession came from Mr. Golochowicz. (T1, 235-238). He sold Mr. Mitchell's car to witness John Mylenek, but claimed he did this at the request of Mr. Golochowicz. (T1, 243).

At the time of the preliminary examination, the prosecutor argued that Petitioner committed a premeditated and deliberated killing of Mr. Mitchell, and made no argument regarding felony murder.

(PE1, 13-16; PE2, 32-33). Based on that argument, the court bound Petitioner over on a charge of "murder." (PE2, 33-34). An information was filed charging Petitioner with "murder," and citing M.C.L. 750.316.

At trial, during opening argument, the prosecutor informed the jury that he was required to prove that there was premeditation and deliberation. (T1, 33):

> "But to give you an idea of what I have to prove in this case, to satisfy the People's burden of proof, the following elements have to be shown, to prove first degree murder: We have to show that the victim died on or about October 29, 1976, within the County of Oakland.
>
> That the victim died as a result of an action of this Defendant, Jerome Golochowicz, and that there is nothing in the evidence to justify or excuse the killing.
>
> That Jerome Golochowicz intended to kill Mr. Mitchell. That he did so with premeditation and deliberation.
>
> Those last two elements, premeditation and deliberation, raises the crime from second degree murder to first degree murder. Premeditation and deliberation are words or art, in the law. It means the Defendant designed and planned to kill him, and had an opportunity to subject the nature of his action to a second look, and used measured actions, when he killed Donald Mitchell."

At the conclusion of the proofs, the prosecutor decided to change the charge to murder committed in the course of a felony, and the judge agreed to allow this over defense objection. (T3, 2, 80). The judge then instructed on felony murder as an alternate means of conviction. (T3, 73-75). The judge instructed that the underlying crime for felony murder was larceny, and instructed the jury on the elements of murder committed in the course of a larceny. (T3, 75-76).

The jury returned a verdict finding the Defendant guilty of "First Degree Felony Murder." (T3, 97).

Petitioner testified at an evidentiary hearing in state court that the defense lacked notice of the felony murder in the course of a larceny charge. (T Oct 18 1983, 77-78).

It was also disclosed at the hearing that defense counsel, Mr. Wolfram, without the consent of Petitioner, (E.H. 39, 66) released to the prosecutor and court before trial a privileged psychological report. (E.H. 33-37, 72). Petitioner was threatened that if he took the stand, the report would be used against him for impeachment. (E.H. 36-37, 93). Based on that, Petitioner did not take the stand and tell his side of the story. (E.H. 79).

REASONS FOR GRANTING THE WRIT

Question 1: Are premeditated murder, and felony murder in the course of a larceny, different crimes because they have different elements, or are they merely different "theories" which need not be separately charged?

Question 2: Do the due process right to notice of the charge and related due process rights require that a charge of felony murder in the course of a larceny include mention of felony murder and specification of which underlying felony is being charged, or can the prosecutor decide what elements are charged after the close of proofs?

Question 3: Did the judicial history of the case, including the first trial where only premeditated murder was instructed on, the intervening preliminary examination where only premeditated murder was argued, and the prosecutor's opening argument at trial stating that premeditation must be proved, serve to inform the accused that he faced only premeditated murder and not murder in the course of a larceny?

In *Schmuck v. United States*, 489 U.S. ___; 109 S. Ct 1443; 103 L.Ed.2d 734 (1989), the Court held that:

"Were the prosecutor able to request an

> instruction on an offense whose elements were not charged in the indictment, [the] right to notice would be placed in jeopardy."

In this case, the Sixth Circuit held that it was acceptable to try Petitioner on a charge of premeditated murder, and then add the charge of felony murder in the course of a larceny after the proofs were closed. Petitioner submits that the Sixth Circuit decision vitiates the rules for certainty in the charging of an offense adopted by this Court in *Russell v. United States*, 369 U.S. 749, 765; 82 S.Ct. 1038; 8 L.Ed.2d 240 (1962), and recently reaffirmed in *Schmuck* . Since the *Schmuck* case seems to support the continuing vitality of *Russell*, but not to the Sixth Circuit, the *Russell* opinion should be revisited and reaffirmed in light of *Schmuck*.

The decision herein also directly conflicts with the Ninth Circuit decision in *Givens v. Housewright*, 786 F.2d 1378 (9th Cir. 1986). Certiorari should be granted to resolve the conflict between circuits.

The issues herein relating to lack of notice of the charge are analogous to issues involved in *Schad v. Arizona*, cert granted 112 L.Ed.2d 202 (1990). *Schad*, like the instant case, involves a question of whether premeditated murder and felony murder are one crime, or different crimes. See *State v. Schad*, 163 Ariz 411; 788 P.2d 1162 (1989).

The Sixth Circuit held that premeditated murder and felony murder are two different crimes in Ohio, but not in Michigan. The supposed difference in case law between the states does not exist, and if it did exist, would be constitutionally insignificant. Under the instant holding, it is constitutional to do in Michigan that which would be unconstitutional if done in Ohio or other states. The ruling will therefore result in an enormous diminution of procedural fairness in Michigan. Certiorari should be granted to preserve equal administration of the laws between Michigan and other states.

The Sixth Circuit appears to abandon the rule, which previously controlled in that circuit and others, that changing the charge after the trial has started is presumptively prejudicial. They then use tortured logic to conclude that knowing what charge one faces is of no benefit to a defendant facing a criminal charge. This case demonstrates the wisdom of the presumed prejudice rule as to notice of charges. If this Court rejects that rule, this case still presents an opportunity to explore when lack of notice of the charge is to be considered harmless.

Certiorari should also be granted to deal with the Sixth Circuit's misuse of *Murray v. Carrier*, 477 U.S. 478; 106 S.Ct. 2639; 91 L.Ed.2d 397(1986) and *Kuhlmann v. Wilson*, 477 U.S. 436; 106 S.Ct. 2616; 91 L.Ed.2d 364 (1986). The Sixth Circuit placed

heavy reliance on these cases even though the holdings have nothing to do with the issues at hand.

All of the way through Petitioner Jerome Golochowicz's trial for "murder," Defendant and counsel believed that the charge was premeditated murder. After all, at his first trial the judge instructed the jury only on the offense of premeditated murder. At the preliminary examination, the prosecutor's argument for bindover mentioned premeditation, and said nothing about murder in the course of a larceny. In opening argument at the trial, the prosecutor informed the jury of the requirement that he must prove premeditation and deliberation.

Imagine counsel's surprise when, after the close of proofs, the prosecutor moved for and received an amendment to the charges, to add the charge of felony murder in the course of a larceny. Counsel objected, but the objection was overruled. Petitioner was found not guilty of premeditated murder, but guilty of the added charge of felony murder in the course of a larceny.

A criminal defendant is entitled to be proceeded against under an indictment or information which, with a fair degree of certainty, specifies the particular charge made against him and which fixes the scope of the prosecution. See, *inter alia*,*Watson v. Jago*, 558 F.2d. 330 (6th Cir. 1977); *Koontz v. Glossa*, 731 F.2d 365 (6th Cir. 1984); *Olsen v. McFaul*, 843 F.2d 918,

930-931 (6th Cir. 1988); see also *In Re Ruffalo*, 390 U.S. 544; 88 S.Ct. 1222; 20 L.Ed.2d 117 (1968); *Blake v. Morford*, 563 F.2d 248 (6th Cir. 1977); *United States v. Weiss*, 752 F.2d 777 (2d Cir. 1985). This is sometimes called the right to fair notice of the charges against you. *Cole v. Arkansas*, 333 U.S. 196, 201; 68 S.Ct. 514; 92 L.Ed. 644 (1948). The judge has the duty to instruct on the charge stated in the information, and instructions which permit a conviction on a crime other than that charged deny due process. U.S. Const., Amend XIV; *DeJonge v. Oregon*, 229 U.S. 353; 57 S.Ct. 285, 81 L. Ed. 278 (1937); *Stirone v. United States*, 361 U.S. 212; 80 S.Ct. 270; 4 L.Ed.2d 252 (1960).

Michigan's first-degree murder statute, M.C.L. 750.316, includes the crime of premeditated and deliberated murder, but also includes 18 other statutory crimes that constitute first degree murder, each having different elements, such as murder by poison, murder in the course of an arson, murder in the course of a rape, etc. The citation in the information to "murder" and to M.C.L. 750.316 may be sufficient to charge premeditated murder, but it cannot reasonably be held to charge all 19 of the different crimes known as first degree murder.

In *Russell v. United States*, supra, this Court held:

"In an indictment upon a statute, it is not

> sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished."

In *Russell*, the Defendants were charged with refusing to testify at a congressional hearing. The indictment specified an incident and charged a single statutory "crime," but the statute in fact included numerous offenses that could involve different elements. The Supreme Court held that a criminal defendant must be informed in advance of trial of the elements of the crime or crimes with which he is being charged. In reversing the conviction of Mr. Price in *Russell*, this Court stated, 369 U.S. at 768:

> "At every stage in the ensuing criminal proceeding Price was met with a different theory, or by no theory at all, as to what the topic [of the congressional hearing] had been. Far from informing Price of the nature of the accusation against him, the indictment instead left the prosecution free to roam at large -- to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal."

Petitioner Golochowicz at all stages was met with

the theory of premeditated murder, until the proofs were over, at which point he was met with the theory of murder in the course of a larceny. The prosecutor was left free to roam at large, to shift his theory of criminality to take advantage of the passing vicissitudes of the trial. The prosecutor, at the end of proofs, was left free to pick and choose from 19 different crimes, free to choose murder in the course of a larceny despite the absence of mention of larceny from the information, and despite his own opening statement that argued that the crime with which he was charging Petitioner required premeditation and deliberation.

It is clear that under *Russell* and *Schmuck*, premeditated murder is a different crime from felony murder in the course of a larceny. *Schmuck* adopts the "elements test" for determining what crime is charged. Both Michigan, *People v. Martin*, 75 Mich. App. 6, 12 (1977) and the Sixth Circuit, *Martin v. Foltz*, 773 F.2d 711, 717 (6th Cir. 1988) (arising out of Michigan) have previously recognized that premeditated murder and felony murder have different elements and are therefore separate crimes, even though prohibited by the same statute.

Petitioner submits that under *Russell*, the prosecutor must specify his choices of which crimes are charged, however many there may be, well before trial starts, not in the middle of a trial after the proofs

are closed. See *Koontz v. Glossa*, supra, where the Sixth Circuit granted habeas corpus when the change in charges was made 3 days before trial. Petitioner Golochowicz had far, far less notice than did the Petitioner in *Koontz v. Glossa*. Petitioner Golochowicz and his attorney had absolutely no knowledge that a taking, a lack of consent of the owner, an intent to steal, etc., were elements of the crimes he was being charged with until after the proofs were closed.

In *Watson v. Jago*, supra, the Sixth Circuit found a constructive amendment of the charges where the defendant was forced to defend against a charge of felony murder in the course of a robbery, upon a charging document which charged premeditated murder. Because felony murder in the course of a robbery had elements additional to those of premeditated murder (i.e., committing a robbery, specific intent to steal, killing committed in the course of the robbery), the defendant could not constitutionally be forced to defend against that charge.

The instant case is similar to that of *Watson v. Jago*. In the instant case, felony murder in the course of a larceny includes elements not included within the charge of murder as stated in the information, i.e., not only that a killing occurred, but that there was a taking of property, that there was no consent of the owner, that there was an intent to permanently deprive the

owner of the property, and that the killing took place in the course of this taking. Further, the instant instructions deleted elements, by making it possible for the jurors to convict Petitioner without finding that Petitioner acted with premeditation and deliberation. Adding some elements and deleting others means that "there has been a modification at trial in the elements of the crime charged," *Watson v. Jago*, supra, and therefore the judge's instructions constituted a de facto amendment of the charges, which is constitutional error. *Watson v. Jago*; *Dunn v. United States*, 442 U.S. 100; 99 S.Ct. 2190; 60 L.Ed.2d 743 (1979).

This case is similar to that of *Watson v. Jago*, but is virtually indistinguishable from that of *Givens v. Housewright*, 786 F.2d 1378 (9th Cir. 1986). In *Givens*, the petitioner was charged in an information that mentioned the Nevada first-degree murder statute that encompassed more than one type of murder. The information did not list "murder by torture" or the word "torture" at all, although it did cite the statute that lists numerous forms of first-degree murder, including murder by torture. The judge instructed the jury on first-degree murder by torture. The Ninth Circuit granted habeas corpus relief. The Court stated:

"We agree with Givens that the

> information was constitutionally inadequate to support a charge of murder by torture. The brief factual recitation in the information, while sufficient to provide notice of a charge of ordinary first-degree murder, does not suggest the special elements of murder by torture...Nor does the information's mere citation to a statutory section which defines the degrees of murder -- and identifies murder by torture as one type of first-degree murder -- provide adequate notice of the charge. *United States v. Rojo*, 727 F.2d 1415, 1418 (9th Cir. 1983)."

If one were to take the above quote, and substitute the words "larceny" for "torture," and "Golochowicz" for "Givens," the statement would be equally true. The instant decision is therefore in conflict with *Givens v. Housewright*, and certiorari should be granted to determine which, if either, accurately states the test.

Where the information does not mention larceny as something the Petitioner is charged with, and where the bindover judge did not state that he was finding a larceny or murder in the course of a larceny, the Petitioner has the right to assume murder in the course of a larceny is not something he is charged with, just as he had the right to assume he was not being charged with murder in the course of an arson or rape.

In *United States v. Heller*, 579 F.2d 990. 999 (6th Cir. 1978) the Court found an indictment defective, holding that "since it fails to charge an essential element

of the crime defined by the statute, the indictment cannot stand." Nowhere in the instant information does the word "larceny" or any equivalent word (theft, stealing, etc.) appear.

Indeed, the prosecutor's opening argument at trial shows that the prosecutor, just like the defense counsel, believed the charge was premeditated murder, and confirms that defense counsel's complaint of surprise was genuine. The prosecutor cannot be permitted to switch to murder in the course of a larceny simply because the trial on the charged crime seems to be going badly. The prosecutor cannot be permitted to mislead defense counsel by arguing one crime and then seeking conviction on another. A criminal defendant has the right to rely on the prosecutor's opening statement in determining what he is being tried for. *United States v. Weiss,* supra, 752 F.2d at 788.

The Sixth Circuit held (App. A4) that the mention of M.C.L. 750.316 gave Petitioner notice that all crimes under that statute were being charged. However, in *Givens v. Housewright*, supra, and *United States v. Jones*, 647 F.2d 696, 699 (6th Cir. 1981), the Courts expressly held that a reference in the indictment or information to a statute does not give notice of more than one charge where the statute includes within it a variety of different charges. The same rule is implicit in *Russell v. United States*.

Petitioner submits that the citation in the

information to M.C.L. 750.316 no more specifies that the charge is to be murder in the course of a larceny than it specifies that the charge is to be murder in the course of an arson or rape. *Givens v. Housewright*, supra; *United States v. Jones*, supra; *Russell v. United States*, supra. The citation in the information to M.C.L. 750.316 no more specifies that the charge is to be murder in the course of a larceny than a citation to Nev. Rev. Stat. §200.030 specifies that the charge is to be murder by torture. *Givens v. Housewright*, supra.

The Sixth Circuit also also relied on a purported absence of prejudice (App. A4-A7). This departs from the preexisting rule that prejudice need not be shown from the mid-trial amendment of charges, *Watson v. Jago*, supra; *United States v. Robison*, 904 F.2d 365 (6th Cir. 1990); *United States v. Yeo*, 739 F.2d 385 (8th Cir. 1984).

In finding no prejudice, the ruling states (App. A6) that "in our case there is no dispute that a larceny occurred." However, it should be noted that Petitioner did not take the stand, and therefore had no occasion either to dispute or agree that a larceny occurred. It is imperative that an accused know which crimes he is charged with before strategy decisions like whether to testify are made.

In finding no prejudice, the panel ignores that even if a larceny did occur, that would not automatically make the killing a felony murder, because the killing

may not have been done by the thief, or if done by the thief, may not have been done "in the course of" the larceny. *People v. Aaron*, 409 Mich. 672 (1980). Of course Petitioner and his counsel had no occasion to decide whether Petitioner should take the stand to dispute a larceny or "in the course of" because they did not know that "in the course of a larceny" was being charged.

The Sixth Circuit's holding (App. A5) that the trial evidence gave notice of the charge is flawed, because one identifies what has been charged "by reference to the statutory elements of the offenses in question, and not...by reference to conduct proved at trial." *Schmuck v. United States*, supra, 103 L.Ed.2d at 746-747.

In that regard, we note that sperm was found in the anus of the deceased, but this could not give notice that the charge was murder in the course of a rape. Under *Schmuck*, it is the charging document, not the evidence, which controls which crime is being charged. See *Gray v. Raines*, 662 F.2d 569 (9th Cir. 1981) [in sex case evidence of girl's age is not notice that age-related sex offense is charged]; *Givens v. Housewright*, supra [in murder case evidence of torture is not notice that murder by torture is charged].

Prejudice from the lack of notice is clearly shown. Because Petitioner went through the entire trial without notice that he would have to defend against the charge that the killing occurred in the course of a larceny, the

lack of notice deprived Petitioner of several actual defenses to the charge on which the judge instructed.

A defense directed at disputing either a taking, or the lack of consent of the property owner, or that the killing was in the course of the larceny, could have been mounted, but was not, because "in the course of a larceny" was not something charged in any document or even verbally. Deprivation of these opportunities to defend is actual prejudice.

Counsel directed his questioning and argument, indeed, his whole case, at disproving the charge he thought was being tried (premeditated murder). For counsel to learn at the end of the trial that there was a second charge being tried (murder in the course of a larceny) means that the trial on the second charge was fundamentally unfair, and therefore a denial of due process. U.S. Const., Amend. XIV. A defendant and his lawyer are entitled to know what is being charged before the trial starts, not after the evidence is in.

Furthermore, adding the charge meant that certain elements were eliminated from jury consideration. The charged offense required premeditation and deliberation. The jury was able to convict Petitioner without the need to find that he premeditated and deliberated. That is also actual prejudice.

The discussion on prejudice in *Givens v. Housewright*, supra,786 F.2d at 1381, uses a similar analysis to conclude that petitioner Givens was

prejudiced:

> "From the information, Givens might reasonably have believed that the state had to prove intent to kill or intent to inflict grievous bodily harm in order to obtain a conviction for first degree murder. He would therefore have seen little reason to dispute evidence suggesting instead an intent to cause cruel pain and suffering. He also would not have been warned of the need to show that he had not acted for the purpose of revenge, extortion, persuasion, or any sadistic purpose. We therefore conclude that the information did not provide notice adequate to enable Givens to prepare a defense against the charge of murder by torture."

This case is virtually indistinguishable from *Givens v. Housewright*, and the same result should be reached: a grant of habeas corpus relief.

The jury in this case specified that Petitioner was convicted only of felony-murder, and not of premeditated murder, so actual prejudice is even more clear than in *Givens v. Housewright*, where the jury did not specify that they were relying only on the added charge in finding the petitioner guilty. That distinguishes this case from *Schad v. Arizona*, supra, where certiorari was recently granted. In this case, the added charge was the only basis of conviction.

Adding a charge in this manner is "prejudicial per

se," *Watson v. Jago*, supra; *United States v. Robison*, supra; *United States v. Yeo*, supra. Petitioner submits that actual prejudice is manifest, and that the presence of both actual and presumed prejudice requires the grant of habeas corpus relief.

The Sixth Circuit stressed (App. A6) that in Ohio, the case of *State v. Ferguson*, 175 Ohio St. 390 (1964) holds that premeditated murder and the various forms of felony murder are different crimes. However, the purported case law distinctions between Ohio[1] and

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[1] The District Judge ruled (App. A11) that Michigan cases suggesting the instant practice to be proper (which actually involved different situations) served to give notice of the charge of felony murder in the course of a larceny. This was purported to stand in distinction to the case law of Ohio and Nevada. The distinction in case law simply does not exist. In *Turner v. State*, 605 P.2d 1140 (Nev. 1980), the Nevada Supreme Court held: "It is permissible to instruct regarding felony murder even though felony murder is not pleaded."

Two years later, in the *Givens* case itself, the claim that it was improper to charge murder and then convict on murder by torture was rejected by the Nevada Supreme Court as being unworthy of discussion. *Givens v. State*, 655 P.2d 533 (Nev. 1982).

Similarly, Ohio courts have also approved the practice found unconstitutional by the Sixth and Ninth Circuits in *Watson v. Jago* and *Givens v. Housewright*. See *Bryant v. State*, 192 N.E. 795, 48 Ohio App. 208 (1933). While the *Watson* case was unreported in the Ohio state courts, it is clear that the Ohio courts approved the practice which the Sixth Circuit held to be unconstitutional.

The Sixth Circuit appears to have abandoned this alleged distinction among state court rulings as a basis for determining the constitutional issues.

Michigan simply do not exist. Michigan's *People v. Martin*, supra, like Ohio's *State v. Ferguson*, supra, also holds that premeditated murder and the various forms of felony murder are different crimes even though prohibited by the same statutes, because they have different elements. Indeed, it would be difficult in light of *Russell* and *Schmuck* to maintain that crimes with different elements are the same crime. The statement in *State v. Ferguson* is little more than a legal tautology obviously applicable to all states.

There simply is no meaningful difference between case law and statutes in Michigan and those in Ohio and Nevada that makes a practice held to be unconstitutional in Ohio and Nevada to be constitutional in Michigan. The Sixth Circuit clearly erred.

The Sixth Circuit also relied on *Murray v. Carrier*, supra, and *Kuhlmann v. Wilson*, supra, to deny relief. *Murray* was a habeas corpus case involving failure to exhaust state court remedies, which was not an issue here. *Kuhlmann* involved the rules for successive petitions for habeas corpus, which cannot apply to this, Petitioner's first petition. The Sixth Circuit ruled that these cases provided a "backdrop" for judging Petitioner Golochowicz's case. Petitioner submits that it is not the atmosphere created by cases that forms a basis for decision; it is the holdings of the cases. Certiorari should be granted so as to prevent the *Murray* and *Kuhlmann* cases from

being misinterpreted and applied to cases to which they do not apply.

Petitioner submits that the differences between premeditated murder and murder in the course of a larceny are not merely differences in "thrust" (App. A1) or "theory" (App. A3, A5) or "emphasis" (App. A8), but differences in the elements that are charged. *Russell* and *Heller* hold that if larceny is not mentioned in the information, then no crime with larceny as an element has been charged. If the instant decision is correct, then *Russell* and *Heller* are wrong. Certiorari should be granted to determine whether a charge of felony murder in the course of a larceny requires mention of felony murder and specification of which underlying felony is being charged, or whether the prosecutor can decide what crime is charged after the close of proofs.

The federal constitutional issues here are real and substantial, and the clear procedural history makes the case exceptionally suitable for Supreme Court review.

Question 4: Did the trial judge's previously stated opinion about the effectiveness of the attorney require him to disqualify himself from the hearing on ineffective assistance of counsel?

The Michigan Court of Appeals remanded the

case to the trial court for a hearing on the claim of ineffective assistance of counsel. The trial judge had previously stated that Petitioner had been very capably represented by counsel. The trial judge prejudged the very matter he was to decide. The subsequent conducting of the hearing itself was rendered pointless.

The question of judicial bias and prejudgment is often discussed in U.S. Circuit Court opinions, but seldom in the U.S. Supreme Court. Yet, it is essential to due process that a hearing be conducted before a tribunal free from bias or prejudgment. U.S. Const, Amend. XIV; *Gardner v. A.H. Robins Co.*, 747 F.2d 1180 (8th Cir. 1984). Indeed, disqualification is required when necessary for the "appearance of justice." *In Re Murchison*, 349 U.S. 133; 75 S.Ct. 623; 99 L.Ed. 942 (1955). This case, involving a simple factual predicate, is quite suitable for exploring this issue.

Question 5: Was counsel ineffective for failing to properly prepare, for failing to allow Petitioner access to discovery, for switching his theories of defense back and forth, for releasing a confidential document which included important statements of the accused, and other shortcomings?

A criminal defendant is entitled to the effective assistance of counsel at trial. *Strickland v. Washington*, 466 U.S. 668; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984); U.S. Const., Amends. VI, XIV. This case applies the general principles to a specific factual setting.

Counsel, without permission from the Petitioner, released to the prosecutor a statement by Petitioner regarding the incident in question. Petitioner was threatened that if he took the stand, the report would be used against him for impeachment. Based on that, Petitioner did not take the stand and tell his side of the story.

Counsel refused Petitioner's requests to be allowed to see and have copies of the discovery materials. The Sixth Circuit (App. A9) adopted the District Court's ruling (App. A14) holding that "defendant had a right to become personally involved in the preparation of his defense." However, neither court provided any means of enforcing this right. A right which cannot be enforced is of course no right at all. If the right is recognized, so also must the remedy be recognized.

These and the other circumstances of the case suggest that there was indeed ineffective assistance of counsel which this Court should review.

Conclusion.

Petitioner Jerome Golochowicz respectfully submits that for the above reasons, this Court should grant the Writ of Certiorari and grant either plenary consideration or summary reversal.

Respectfully submitted,

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Dated: December 29, 1990

NO. 89-2071
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JEROME GOLOCHOWICZ

Petitioner-Appellant,

v.

HENRY GRAYSON, Warden, Charles Egeler Correctional Facility,

Respondent-Appellee.

On Appeal from the United States District Court for the Eastern District of Michigan

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Before: JONES and GUY, Circuit Judges; and PECK, Senior Circuit Judge.

PER CURIAM. Petitioner, Jerome Golochowicz, appeals from the denial of his habeas corpus petition. Golochowicz sought habeas relief under a number of theories, chief of which was that he was convicted of felony-murder after a trial in which the principal prosecutive thrust was premeditated murder. Upon a review of this issue as well as petitioner's other claims of error, we conclude that the denial of the writ was proper and we affirm.

I.

On November 1, 1976, Donald Mitchell was found dead at his home, having been strangled to death. There were no eyewitnesses to the killing. Petitioner

was ultimately arrested and charged with the murder. Although the evidence was circumstantial, it was strong. Golochowicz's fingerprints were found in Mitchell's condominium and Golochowicz also was in possession of, and sold a number of, items taken from the victim's house at the time of the murder, including a yellow Lincoln automobile. Some of Golochowicz's cronies to whom he offered to sell the stolen goods testified against him. Petitioner also used credit cards taken from the victim and cashed checks taken from the victim's stolen checkbook.

At trial, the prosecution, over objection, also introduced one other telling piece of evidence. Dennis O'Clare, one of the persons to whom petitioner first offered the stolen goods, testified that on November 4, 1976, Golochowicz offered him a Sony television set. In order to get it, however, O'Clare had to accompany Golochowicz to a house where O'Clare discovered a dead body. The apparent cause of death was strangulation by an electrical cord in much the same manner as Mitchell had been strangled. After they looted the house, Golochowicz admitted to O'Clare that he had killed the man in the house and described how he did it, although later denied that he did it.

After being found guilty of first degree murder, Golochowicz appealed his conviction and, although it was affirmed by the Michigan Court of Appeals,[1] it was later reversed by the Michigan Supreme Court.[2] In a 4-3 decision, the Michigan Supreme Court concluded that the evidence as to the second killing should not have been admitted into evidence under the "similar

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[1] People v. Golochowicz, 89 Mich. App. 57 (1979)

[2] People v. Golochowicz, 413 Mich. 298 (1982).

acts rule."

Golochowicz was retried and again found guilty. At the second trial, the prosecution, of course, had to proceed without the benefit of the jury learning of the second murder. It appears clear that the prosecution again was proceeding on a premeditated murder theory. At the end of the case, however, the prosecution asked for and received, over objection, a felony-murder instruction. The jury found Golochowicz guilty of felony-murder.

This second conviction was appealed and upheld by the Michigan Court of Appeals.[3] The Michigan Supreme Court declined review.

II.

After Golochowicz's first conviction was reversed and the case remanded, a new preliminary examination was held and Golochowicz was bound over for trial. The prosecution then filed an information charging that petitioner "did murder Donald Havens Mitchell; contrary to Section 750.316 of the Compiled Laws of 1970, as amended, M.S.A. 28.548. (Maximum Penalty - Life)." (App. 12). By citing Mich. Comp. Laws. Ann. § 750.316, it is clear that murder in the first degree was charged.[4] In 1976, Mich. Comp. Laws. Ann. §750.316 read in pertinent part:

> All murder which shall be perpetrated by means of poison, or lying in wait, or any kind of

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[3] People v. Golochowicz, Docket No. 70322 (unpublished).

[4] Mich. Comp. Laws Ann. §750.317 covers second degree murder.

> wilful, deliberate and premeditated killing, or which shall be committed in perpetration, or attempt to perpetrate ... larceny of any kind, extortion or kidnapping ... shall be murder of the first degree ....

Under Michigan law, as the state trial judge properly instructed the jury,[5] in order to find a defendant guilty of mruder in the first degree, it is first necessary that the jury find all of the elements of second degree murder. These include that the defendant "intended to kill, that is he intended to do great bodily harm, or that he committed a wanton and wilful act, the natural tendency of which is to cause death or great bodily harm." (App. 102). This element, commonly referred to as the "malice" element, is necessary for a felony-murder conviction in Michigan since the Michigan Supreme Court's decision in People v. Aaron, 409 Mich. 672 (1980).[6]

Thus, when petitioner was charged under Mich. Comp. Laws Ann. §750.316, he was on notice that he was charged with an intentional killing with malice (second degree murder), which was aggravated to first degree murder by either premeditation or the commission of one of the felonies enumerated in section

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[5] Petitioner does not object to the language of the instructions given, only to the fact that a felony-murder theory was allowed to go to the jury.

[6] Prior to Aaron, Michigan applied the common-law felony-murder rule. Aaron was not made to apply retroactively. Id. at 734. The Aaron rule was applicable to petitioner's second trial in 1983.

750.316. Larceny is a section 750.316 enumerated felony. He also knew something else, however. He knew from the first trial that the larceny would be an important element of the prosecution's circumstantial case, since it was his possession of the victim's stolen goods and his attempts to peddle them that formed a substantial part of the State's case. Since it was clear that a larceny had been commited, and likely that a jury would conclude that a strangulation killing was a direct result of someone acting with an intent to kill, petitioner, by way of defense, attempted to convince the jury that he was not involved at all. Since no one could directly connect petitioner with the crime, this was not a defense bereft of any possibility of success. Thus, the contours of his defense were not shaped by the particular aggravating circumstance on which the prosecution might choose to rely in attempting to prove first degree murder.

In arguing that the trial was fatally flawed by the prosection switching theories at the end of the trial, petitioner relies primarily on two cases, Watson v. Jago, 558 F.2d 330 (6th Cir. 1977), and Givens v. Housewright, 786 F.2d 1378 (9th Cir. 1986). Although we find both of these cases apposite, we do not find them controlling under the facts here.

In Watson, defendant Watson was involved in the alleged attempt to rob a grocery store, which resulted in Watson shooting and killing the owner, the latter fact not being in dispute. Watson, in a proceeding under Ohio law, was indicted by a grand jury and charged with premeditated first degree murder only. The prosecution, in his opening statement said: "The evidence ... will convince you ... that ... Watson ... did ... maliciously, premeditatively and while in the act of a robbery murder Willie Dallas." 558 F.2d at 332. Defense counsel immediately made a motion to dismiss the indictment

because of the reference to a robbery.[7] The motion was denied.

There are three factors which distinguish Watson, from our case. First, in Watson, there was no robbery and it was not at all clear that even an attempted robbery was involved. In our case there is no dispute that a larceny occurred. Second, Watson was admittedly the trigger man and he claimed self defense, which would be a defense to premeditated murder, but not felony-murder if a robbery was in fact being committed or attempted. Third, existing Ohio case law provided that:

> [A] felony-murder conviction cannot be sustained under an indictment charging first degree murder with premeditation and deliberate malice. The Ohio Supreme Court in State v. Ferguson, 175 Ohio St. 390, 195 N.E.2d 794 (1964), held that although felony-murder and premeditated murder were both included in the same paragraph of the then existing first degree murder statute, felony-murder and premeditated murder constituted separate offenses.

Watson, 558 F.2d at 334-335 (footnote omitted).

Even if there were no Ohio case law, it is clear that Watson was entitled to know whether he should beat the self-defense drum, which could save him from a premeditated murder conviction, or concentrate his efforst on showing no robbery was contemplated, which could get him off the felony-murder hook. Golochowicz, as we have explained, was not on the horns of such a

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[7] Under the then existing Ohio first degree murder statute, premeditated murder and felony murder were both included in the first degree murder statute.

dilemma here.

Givens v. Housewright involved a first degree murder prosecution in which the trial judge instructed the jury on two types of first degree murder: murder by torture and premeditated murder. The significant difference between the two is that in a murder-by-torture prosecution there need be no intent to kill. Givens maintained the information did not give him adequate notice that he would face a charge of murder by torture. Although the state courts and the federal district court rejected this argument, the Ninth Circuit agreed with Givens and granted his habeas petition.

Putting aside whether we agree with the Ninth Circuit conclusion, the difference between Givens and the instant case is clear. Givens structured a defense on no intent to kill, only to have the rug pulled out from under him at the conclusion of the case. Golochowicz was not placed in a similar position.

In reaching our conclusion that no error occurred here which entitles Golochowicz to habeas relief, we emphasize that our habeas review of this state court decision is "the narrow one of due process, and not the borad exercise of supervisory power that [a state] would possess in regard to [its] own trial court.'" Donnelly v. DeChristoforo, 416 U.S. 637. 642 (1974) (footnote omitted) (quoting from DeChristoforo v. Donnelly, 473 F.2d 1237, 1240 (1st. Cir. 1973)). This point is well illustrated by the reversal of Golochowicz's first conviction by the Michigan Supreme Court. The court was obviously concerned with the misuse of the "separate crimes" doctrine and, in addition to overturningn Golochowicz's conviction, used its supervisory powers to promulgate a prophylactic rule for the future. Whether a federal court in a habeas proceeding would have been compelled to reach the same result is open to serious question.

Although the great number of habeas cases decided by the Supreme Court and the lower federal courts has resulted in a body of law which can only be described as Byzantine,[8] there is one concept that remains constant. Fundamental fairness is the ultimate test in evaluating a due process claim. It is a test that cuts both ways. For example, in Murray v. Carrier, 477 U.S. 478 (1986), the Court applied the concept of fundamental fairness and overlooked procedural irregularities.[9] Cutting the other way is the view expressed by at least some members of the Court that fundamental fairness should require the federal courts to entertain habeas petitions "only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence." Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (dealing with successive habeas petitions).

Against this backdrop, we find no absence of fundamental fairness insofar as Golochowicz's trial was concerned. The original charge was never limited to premeditated murder and he was not deprived of his defense by the prosecutor's change of emphasis.

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[8] Justice Stevens opined that the Court "has lost its way in a procedural maze of its own creation." Smith v. Murray, 477 U.S. 527, 541 (1986) (Stevens, J., dissenting).

[9] "Accordingly, we think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." Murray v. Carrier, 477 U.S. 478, 496 (1986).

III.

Petitioner also raises three other arguments: (1) the court lacked jurisdiction to try petitioner for felony murder after a bindover for murder, (2) ineffective assistance of counsel, and (3) denial of a fair trial due to testimony being introduced that he ws given his Mlranda rights, although he made no statement to the police.[10] Upon review, we find no merit to any of these arguments. The district judge addressed all of these issues, and we agree with his resolution and adopt it as this court's opinion.

AFFIRMED.

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[10] The jury was never told he made no statement.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JEROME GOLOCHOWICZ,

Petitioner,

CASE NO. 88-CV-72296-DT

vs.

HENRY GRAYSON, Warden, Charles Egeler Correctional Facility,

HON. BARBARA K. HACKETT

Respondent.
_____/

MEMORANDUM OPINION

Petitioner, represented by counsel, seeks the issuance of a writ of habeas corpus to release him from the custody of the respondent warden. He was sentenced to life in prison after a jury convicted him of first degree felony mruder in early 1983.

The petitioner raises five issues: (1) he was convicted of felony murder after being tried on the theory of premeditated murder; (2) the trial court lacked jursidction to try him for felony murder because he was bound over on a charge of murder; (3) the trial judge should have disqualified himself; (4) he had ineffective assistance of trial counsel; and (5) he was denied a fair trial because the jury heard that he was advised of his Miranda rights in a way that implied he made no statements.

I

In support of his first claim, counsel for petitioner relies primarily on Watson v. Jago, 558 F.2d 330 (6th Cir. 1977), and Givens v. Housewright, 786 F.2d 1378 (9th Cir. 1986). The court concludes that both cases are distinguishable. Watson involved an indictment returned by an Ohio grand jury. The law regarding amendments to indictments and variances in proof from the charges is very strict, in recognition of the fact that it is the grand jury, and not the prosecutor, who accuses the defendant. By contrast, F.R.Cr.P. 7(e) allows a federal prosecutor's information "to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." The court is aware that this case is not governed by Rule 7, but the distinction is obvious as between an indictment and an information, and the record fails to show any prejudice to petitioner is the sense that he was deprived of fair notice and an opportunity to defend. As noted by the Attorney General, plaintiff's trial counsel did not object on federal due process grounds to the instruction, and the prosecutor's information was in a form that allowed either (or both) theories to be pursued at trial (Respondent's Brief, p. 5). As noted by the Michigan Court of Appeals, "[t]he defense presented here was that of a failure by the prosecutor to connect defendant with this crime. Such a defense would have been equally appropriate against a charge of felony-murder."

The Ninth Circuit decision in Givens presents a closer question, because that court concluded that a criminal information charging the accused "'with malice aforethough, wilfully and feloniously'" killing the victim "'by striking [her] about the head and body with his fists'"

did not provide notice to the accused adequate to enable him to prepare a defense against the charge of murder by torture, upon which he was apparently convicted. Givens, supra, 786 F.2d at 1380, 1381. However, the Michigan cases cited by the Attorney General (Respondent's Brief, p. 5) make it clear to this court that a Michigan criminal defense lawyer would necessarily expect the prosecution to proceed upon both theories that were utilized in the case at bar. The court again notes the failure of petitioner to show how he was prejudiced.

II

The second issue raised, that the trial court lacked jurisdiction to try petitioner as a felony-murder theory because he was bound over on a premeditated murder theory, is not cognizable in a federal habeas corpus proceeding because it involves state law questions only. There is no constitutional requirement for a preliminary examination to be held before the state may try an accused, and even of the stricter arena of the indictment system of criminal justice, "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits. The Fifth Amendment requires nothing more." (emphasis supplied). Costello v. United States, 350 U.S. 359 at 363 (1956).

III

Petitioner's third claim, that Judge Ziem should have disqualified himself from holding the evidentiary hearing on the ineffective assistance of counsel claim because he had stated at the time of sentencing that he

thought petitioner was very capably represented by counsel, is also without federal constitutional merit. Such a statement merely reflects the trial judge's state of mind after presiding at the trial and in the context of a sentencing dialogue. It does not indicate a judicial bias regarding the case petitioner later presented at the evidentiary hearing on his claim if ineffective assistance. United States v. Grinnell Corporation, 384 U.S. 563 (1963); Bradley v. Milliken, 620 F.2d 1143 (6th Cir.), cert. denied 449 U.S. 870 (1980); Shaw v. Martin, 733 F.2d 304 (4th Cir.), cert. denied 469 U.S. 873 (1984).

IV

Petitioner's claim of ineffective assistance of trial counsel contains the following assertions of counsel deficiencies:

(1) counsel failed to respond to his request for information and a companion request to file a motion for discovery;

(2) counsel failed to object to the introduction of allegedly inflammatory photographs;

(3) counsel declined to follow petitioner's request that no witnesses be waived;

(4) counsel failed to ask questions of the witness suggested by petitioner;

(5) counsel should have reserved his opening statement until the prosecution rested its case;

(6) counsel, without petitioner's consent, gave over a psychological report in which petitioner admitted the killing and gave mitigating circumstances. This led to petitioner not testifying at his trial because of fear of impeachment; and

(7) counsel continually changed his theory of the case, from insufficient evidence to diminished capacity and back again.

The treatment accorded this issue by the Michigan Court of Appeals more than adequately deals with this subject, and this court adopts it by reference. The following extract is appropriate:

> Defendant's first complaint with his trial counsel's representation concerns the failure to file a motion for discovery until six days before trial despite an earlier request by defendant that such a motion be made. Trial counsel testified, however, that he was permitted to review all documentary and physical evidence prior to trial. Further, defendant's primary concern centers around a report allegedly failing to link defendant with sperm found in the victim's anus. Trial counsel's cross-examination of two prosecution witnesses established that no connection could be made, and also revealed a discrepancy in their testimony as to whether any evidence of semen existed. These points were covered in the closing argument to the jury. It is therefore clear, as in People v. Anderson, 112 Mich. App. 640, 647; 317 NW2d 205 (1981), that defendant's attorney could not have been more effective if an earlier discovery motion had been filed, and such action would not have afforded defendant a reasonably likely chance of acquittal.
>
> Defendant also complains of his trial counsel's failure to pass all relevant documents and evidence along to defendant for his review of same. While we agree that defendant had a right to become personally involved in the preparation of his defense, we do not belive that an attorney's failure to actually involve his client constitutes the ineffective assistance of counsel. The rule was

designed primarily to protect the defendant's right to a fair trial. Strickland v. Washington, US ; 104 S Ct 2052; 80 LEd2d 674, 694 (1984); People v. Garcia, supra. We do not believe defendant was denied this right due to his inability to view the documentary evidence prior to trial.

Next, defendant complains of his counsel's failure to object to the introduction of two photographs of the victim's body. Although the photographs were not included in the record, certain testimony described them as showing the victim's head face-down, a bathrobe tie wrapped around his neck, with the remainder of his body covered by a blanket. Since the photographs were not particularly gruesome, we do not believe a reasonable probability of acquittal would have resulted from their exclusion.

Defendant also cites his attorney's failure to object to the testmiony of one of the arresting police officers regarding defendant's receipt of Miranda warnings. As discussed earlier, since defendant's silence was never mentioned, we find no merit to this argument. An objection may have highlighted the testimony for the jury, and thus the failure to object may have been legitimate trial strategy. In any event, the jury was cautioned by the trial court not to consider the defendant's silence as an admission of guilty, and thus we find no support for defendant's ineffective assistance claim.

Next, defendant lists various questions which he requested his attorney ask during the examination of certain witnesses and complains

that his request was ignored. His attorney testified, however, that some of the questions were indeed asked, although in reworded form. The remaining questions, he considered dangerous to his client's interests, and thus he declined to use them. Again, we consider such a decision a matter of trial strategy, an area in which we decline to substitute our judgment for that of trial counsel. People v. Burns, 118 Mich App 242, 247; 324 NW2d 589 (1982).

We also find no merit to defendant's complaint with his counsel's decision to waive three witnesses whose testimony he belived could offer nothing of substance, and his decision to give an opening statement contrary to the defendant's wishes. These decisions were, again, legitimate trial tactics. Although a defendant has the right to conduct his own defense, an attorney has the obligation to represent his client competently. Further, we cannot agree that either decision was of such significance that the defendant's chances of acquittal were seriously affected.

Finally, defendant contends that his attorney released a psychiatric report compiled by clinical psychologist Michael Kalisewicz to the Forensic Center without his permission. When the defendant decided prior to trial to abandon a diminished capacity defense in favor of one of insufficient evidence, the prosecutor relayed his intent to call Kalisewicz as an impeachment witness. Defendant now claims the fear of impeachment influenced his decision not to testify at trial.

Whether or not defendant actually agreed to the release of the report, we do not believe that its release constituted the ineffective assistance of counsel. The report would have been quite helpful if defendant had continued to pursue the diminished capacity defense. For example, the report concluded that the "flood of emotions" experienced by defendant at the time of the murder was counterindicative of premeditation. Thus, at the time of the report's release, the trial counsel's action constituted a legitimate step toward preparing the best possible defense for his client. Although the report was of no value in presenting an insufficient evidence defense, one must rely upon hindsight to conclude that its release was unwise. Further, despite defendant's claims on appeal, there is no reason to believe that the fear of impeachment played a role in his decision not to testify since defendant did not testify at his first trial, which was held prior to the preparation and ultimate release of the report. Finally, in light of the evidence presented at trial linking defendant with the murder, we do not believe his testimony would have provided a reasonably likely chance of acquittal. Therefore, defendant's claim that he was denied the effective assistance of counsel is rejected and his conviction is affirmed.

V

Lastly, petitioner's claim that his constitutional right to remain silent was invaded by the testimony of the arresting officers that he was advised of his "rights" is without merit. None of the cases cited by petitioner's

counsel supports a claim for habeas relief on this basis. The jury was never informed directly that petitioner had remained silent, although it could have inferred that fact from the absence of any statement given, just as they knew he did not testify as a witness in the trial itself. There is no claim that the prosecutor argued petitioner's silence to the jury, and he was free to request the appropriate cautionary instruction if he so chose. Finally, as noted by The Michigan Court of Appeals, the failrue to object at trial makes appellate review doubtful. For habeas purposes, petitioner would have to show both cause and prejudice, and he has done neither.

The petition for a writ of habeas corpus will be denied. An appropriate Order and Judgment may enter.

BARBARA K. HACKETT
UNITED STATES DISTRICT JUDGE

Dated: August 29, 1989

(2)

Supreme Court, U.S.
FILED
FEB 6 1991
OFFICE OF THE CLERK

No. 90-1122

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1990

JEROME GOLOCHOWICZ,

Petitioner,

v.

HENRY GRAYSON, Warden,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I

WAS PETITIONER EFFECTIVELY NOTIFIED THAT HE COULD BE FOUND GUILTY OF FIRST-DEGREE FELONY MURDER WHEN HE WAS CHARGED IN AN INFORMATION ON AN OPEN CHARGE OF MURDER UNDER MICHIGAN LAW?

II

DID A REMARK MADE BY THE TRIAL JUDGE AT SENTENCING REQUIRE THE JUDGE TO DISQUALIFY HIMSELF FROM A LATER POST-TRIAL HEARING ON INEFFECTIVE ASSISTANCE OF COUNSEL?

III

WAS PETITIONER DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL?

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STATE STATUTORY PROVISIONS

MCL 750.316: text quoted in Petition for Writ of Certiorari, p 3.

MCL 767.44:

The following forms may be used in the cases in which they are applicable but any other forms authorized by this or any other law of this state may also be used:

Adultery--A. B., a married man, committed adultery with C. D.; or A. B. committed adultery with C. D., a married woman.

Affray--A. B. and C. D. made an affray.

Assault--A. B. assaulted C. D.

Assault and Battery--A. B. committed an assault and battery on C. D.

Assault with intent--A. B. assaulted C. D. with intent to murder, or kill, or rob, or maim, or rape (as the case may be).

Arson--A. B. committed arson by burning the dwelling house of C. D.

Attempt--A. B. attempted to steal from C. D.; A. B. attempted to commit larceny of the goods of C. D.; A. B. attempted to commit burglary of a building belonging to C. D. (as the case may be).

Burglary--A. B. committed burglary of the house of C. D. A. B. broke and entered the dwelling house of C. D. in the night time with intent to commit larceny, or murder, or robbery therein (as the case may be).

Conspiracy--A. B. and C. D. conspired together to murder E. F. or to steal the property of E. F. or to rob E. F. (as the case may be).

Forgery--A. B. forged a certain instrument purporting to be a promissory note (or describe instrument or give its tenor or substance).

Larceny--Embezzlement and false pretenses. A. B. stole from C. D. 1 horse of the value of more than 100 dollars.

Murder--A. B. murdered C. D.

Manslaughter--A. B. killed C. D.

Perjury--A. B. appeared as a witness in a case between C. D. and E. F. being heard before the (set forth the tribunal) and committed perjury by testifying as follows: (set forth the testimony).

Rape--A. B. raped or ravished C. D.

Rape (statutory)--A. B. raped or ravished C. D., she C. D. being then under the age of (statutory age) years.

Robbery Armed--A. B. robbed C. D., A. B. being armed.

Robbery--A. B. robbed C. D., A. B. not being armed.

Provided, That the prosecuting attorney, if seasonably requested by the respondent, shall furnish a bill of particulars setting up specifically the nature of the offense charged.

MCL 767.71:

In all indictments for murder and manslaughter it shall not be necessary to set forth the manner in which nor the means by which the death of the deceased was caused; but it shall be sufficient in any indictment for murder to charge that the defendant did murder the deceased; and it shall be sufficient in manslaughter to charge that the defendant did kill the deceased.

STATEMENT OF THE CASE

On November 1, 1975, Donald Mitchell was found dead at his home, having been strangled to death with the belt from his bathrobe. (Trial Tr., Vol. I, 50-56, 162). There were no eyewitnesses to the killing. Petitioner was ultimately arrested and charged with the murder based upon a strong case of circumstantial evidence. Petitioner's fingerprints were found in Mitchell's condominium. (Trial Tr., Vol. II, 30-38). Petitioner was in possession of and sold a number of items taken from the victim's home at the time of the murder, including the victim's yellow Lincoln Continental automobile and stereo speakers. (Trial Tr., Vol. I, 194-197, 234, 239-240; Vol. II, 120-123). Petitioner also used credit cards taken from the victim (Trial

Tr., Vol. I, 179-190), and forged the victim's signature and cashed checks taken from the victim's stolen checkbock. (Trial Tr., Vol. I, 199-202).

Petitioner was first tried for Mitchell's murder in 1977 and was jury convicted of first-degree murder. Although the Michigan Court of Appeals affirmed the conviction, People v Golochowicz, 89 Mich App 57; 279 NW2d 576 (1979), it was later reversed by the Michigan Supreme Court because evidence of another uncharged murder allegedly committed by Petitioner was erroneously admitted at trial under Michigan's "similar acts" evidence rule. People v Golochowicz, 413 Mich 298; 319 NW2d 518 (1982).

After Petitioner's first conviction was reversed and the case remanded, a new

preliminary examination was held and Petitioner was bound over for trial on an open charge of murder pursuant to MCL 767.44 and 767.71. The prosecution then filed an information charging that Petitioner "did murder Donald Havens Mitchell" and citing Michigan's first-degree murder statute, MCL 750.316.

In opening argument, it appeared that the prosecution was proceeding on a premeditated murder theory. (Trial Tr., Vol. I, 33). At the end of the case, however, the prosecution asked for and received, over objection, a felony murder instruction. An instruction on premeditated murder was also given. (Trial Tr., Vol. III, 72-76). The jury found Petitioner guilty of felony murder.

The second conviction was appealed and was upheld by the Michigan Court of

Appeals in an unpublished opinion. The Michigan Supreme Court declined to review. In 1988, Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan. Habeas corpus relief was denied by the district court in a memorandum opinion and judgment entered August 29, 1989. The United States Court of Appeals for the Sixth Circuit affirmed the denial in an unpublished per curiam opinion and order entered October 22, 1990.

REASONS FOR DENYING THE WRIT

THE PETITION PRESENTS NO IMPORTANT UNSETTLED QUESTION OF FEDERAL LAW AND THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER UNITED STATES COURTS OF APPEALS.

In this habeas corpus proceeding, Petitioner alleges that he was denied fair notice that he could be convicted of felony murder when he was charged with murder in the common-law form under Michigan's "open murder" statute. This Court established long ago that such a claim is purely a matter of state law in Bergemann v Backer, 157 US 655 (1895), and Kohl v Lehlback, 160 US 293 (1895). Petitioner also alleges that the trial judge should have disqualified himself from a post-trial hearing and that Petitioner was denied the effective assistance of counsel. The legal princi-

ples involved in evaluating recusal of a judge are clearly established in United States v Grinnell Corp., 384 US 563 (1966), and the legal principles involved in evaluating claims of ineffective assistance of counsel are clearly established in Strickland v Washington, 466 US 668 (1984).

Petitioner does not challenge any of these controlling legal principles, and it is clear that the outcome of his case depends solely upon the application of those principles to the unique facts of Petitioner's 1983 trial. Respondent submits that there are no conflicts among the United States Circuit Courts of Appeal as to Petitioner's first issue, as Petitioner claims. Rather, the differences in the Courts' decisions reflect constitutionally permissible differences

in state law regarding the wording of first-degree murder charges. Respondent further submits that Petitioner's allegations were very carefully and correctly evaluated by both the Michigan courts and by the federal courts in this habeas corpus proceeding, and it is clear that there was no constitutional error.

A. Petitioner Was Not Denied Fair Notice That He Could Be Found Guilty Of First-Degree Felony Murder Under Michigan's First-Degree Murder Statute.

In Bergemann v Backer, 157 US 655 (1895), this Court upheld the constitutionality of a conviction of first-degree murder where the appellant had been charged with open murder under a state statutory scheme virtually identical to Michigan's. Accord, Kohl v Lehlback, 160 US 293 (1895). The appellant in

Bergemann was charged under an indictment stating that, on a day and within the county named, he "did willfully, feloniously, and of his malice aforethought kill and murder" the victim. Bergemann, 157 US at 655. Bergemann claimed that his New Jersey conviction of first-degree murder on that charge was unconstitutional, as the charge gave him notice only of second-degree murder.

This Court held that whether the indictment sufficiently charged first-degree murder was a question of state law. Id., at 656. The Court quoted the language of New Jersey's first-degree murder statute and its open murder statute, which are virtually identical to MCL 750.316 and MCL 767.71, the open murder statutes of both states encompassing both first-degree premeditated murder and

felony murder committed in the course of several enumerated felonies. This Court concluded that an open murder charge, where permitted by state law, is consistent with the due process of law required by the Fourteenth Amendment:

> "[A]n indictment charging, in a general form, the perpetration of murder, without indicating which of the two felonies into which that offense was divided by the statute, was sufficient to fulfill the constitutional requirement of informing the defendant of the nature and cause of the accusation against him. The effect of the statute ... was neither to add any case to nor take any case from the class of crimes which, at common law, was denominated murder, for every act that was murder at common law was still murder in New Jersey. What the statute effected ... was to distribute the offense into two classes for the sake of adjusting the punishment."

Bergemann, supra, at 657 [citing Graves v State, 45 NJL 203 (1894)]. Accord, People v Potter, 5 Mich 1 (1858); People v Scott, 6 Mich 287 (1859).

Petitioner was charged with first-degree murder in an information which contained both the short form language permitted by the "open murder" statutes, MCL 767.44; MCL 767.71 ("Defendant did murder Donald Havens Mitchell") and a citation to the first-degree murder statute, MCL 750.316. Michigan's first-degree murder statute encompasses both first-degree premeditated murder and first-degree felony murder:

> "Murder which is perpetrated by means of poison, lying in wait, or other wilful, deliberate, and premeditated killing, or which is committed in the perpetration , or attempt to perpetrate arson, criminal sexual conduct in the first or third degree, robbery, breaking and entering of a dwelling, larceny of any kind, extortion, or kidnapping, is murder of the first degree, and shall be punished by imprisonment for life."

Petitioner contends that an unconstitutional amendment of the information

occurred when the trial judge instructed the jury on first-degree felony murder. Petitioner claims that he was denied fair notice that he could be convicted of first-degree felony murder when he was bound over for trial on a charge of open murder and when the prosecution referred only to first-degree premeditated murder in opening argument. The courts below rejected this contention, finding that under Michigan law, open murder charges are permitted and Michigan defense lawyers would expect the prosecution to proceed on whatever murder theories the evidence would support.

In Michigan, informations charging open murder or murder of an unspecified degree have long been common in practice, Brownell v People, 38 Mich 732 (1878), and are permitted by statute, MCL 767.44

and 767.71. When a person is indicted on an open murder charge, upon finding that person guilty of murder, the jury must then determine the degree of murder. People v Johnson, 427 Mich 98; 398 NW2d 219 (1986). An open murder charge will support a conviction of first-degree premeditated murder, second-degree murder, or, as in this case, first-degree felony murder. People v McKinney, 65 Mich App 131; 237 NW2d,215 (1975). Accord, People v Page, 198 Mich 524; 165 NW 755 (1917); People v Turner, 26 Mich App 632; 182 NW2d 781 (1970).

In People v Johnson, supra, the Michigan Supreme Court reiterated that murder is a single offense under the open murder statute and that at the information stage of proceedings, only a charge that the defendant murdered the deceased need be set forth.

Under Michigan law, as the state trial judge properly instructed the jury, in order to find a defendant guilty of murder in the first degree, it is first necessary that the jury find all of the elements of second-degree murder. These include that the defendant "intended to kill, that is he intended to do great bodily harm, or that he committed a wanton and wilful act, the natural tendency of which is to cause death or great bodily harm." (Trial Tr., Vol. III, 72-75). This element, commonly referred to as the "malice" element, is necessary for a felony-murder conviction in Michigan. People v Aaron, 409 Mich 672; 299 NW2d 304 (1980).

Thus, when Petitioner was charged under MCL 750.316, he was on notice that he was charged with an intentional kill-

ing with malice (second-degree murder), which was aggravated to first-degree murder by either premeditation or the commission of one of the felonies enumerated in section 750.316, which includes larceny.

Petitioner also knew, by virtue of the first trial and the preliminary examination that preceded the second trial, that larceny would be an important element of the prosecution's circumstantial case, since it was Petitioner's possession and use of the victim's stolen goods and his attempts to sell some of them that formed a substantial part of the evidence against him.

Petitioner's reliance upon Russell v United States, 369 US 749 (1962), Schmuck v United States, 489 US 705 (1989),

Watson v Jago, 558 F2d 330 (6th Cir, 1977) and Givens v Housewright, 786 F2d 1378 (9th Cir, 1986), is misplaced. Unlike Russell and Schmuck, the instant case does not involve a criminal charge returned by a grand jury. The law regarding amendments to indictments and variances in proof from the charges is very strict, in recognition of the fact that it is the grand jury, and not the prosecutor, who accuses the defendant. By contrast, Fed. R. Crim. P. 7(e) allows a federal prosecutor's information "to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." Respondent is aware that this case is not governed by Rule 7, but the distinction is obvious as between an

indictment and an information, and the record fails to show any prejudice to Petitioner in the sense that he was deprived of fair notice and an opportunity to defend.

In addition, Schmuck deals only with the issue of the proper test to be used to determine when a defendant is entitled to a jury instruction on a lesser included offense under Fed. R. Crim. P. 31(c). No issue of fair notice was decided in that case.

Watson and Givens, supra, also do not control, and the decision of the Sixth Circuit below is not in conflict with that of the Ninth Circuit in Givens. In Watson, the habeas petitioner was indicted on first-degree murder with deliberate and premeditated malice, but

was convicted of second-degree murder. At trial, the prosecutor introduced a theory of felony murder. Under Ohio law, a felony murder conviction cannot be sustained under an indictment charging first-degree murder with deliberate and premeditated malice. Watson, 558 F2d at 334. Therefore, the Sixth Circuit found that the petitioner was improperly denied notice of the prosecution's felony murder theory.

In the instant case, in contrast, Petitioner was charged under the Michigan open murder statute which does permit conviction of either first-degree premeditated murder or felony murder. The instant case is analogous to Blake v Morford, 563 F2d 248 (6th Cir, 1977), cert den, 434 US 1038 (1978). In Blake, the Sixth Circuit held that since

Tennessee, like Michigan, charges murder in the common-law form, a person can be convicted of first-degree felony murder even when the indictment charges only first-degree premeditated murder without resulting in a constructive amendment. 563 F2d at 251. The court held that Blake was not deprived of fair notice because under Tennessee law, he was not tried and convicted for a crime not charged in the indictment. Id., at 252. The same is true in the instant case.

Givens v Housewright, supra, involved a Nevada first-degree murder prosecution in which the trial judge instructed the jury on two types of first-degree murder: murder by torture and premeditated murder. The significant difference between the two is that in a murder-by-torture prosecution there need be no

intent to kill. Givens maintained the information did not give him adequate notice that he would face a charge of murder by torture. Although the state courts and the federal district court found no violation of state law or federal due process, the Ninth Circuit granted the habeas petition. The court's decision was based on the fact that Givens had structured his defense on lack of intent to kill. He was thus prejudiced at the conclusion of the case with the addition of the murder by torture instruction because lack of intent is not a defense to that charge.

Both the Ninth and Sixth Circuits agree that actual prejudice resulting from an amendment to the charge must be shown before a petitioner is entitled to the writ of habeas corpus. See, e.g.,

Givens, supra, 786 F2d at 1381; Gray v Raines, 662 F2d 569, 574 (9th Cir, 1981); Martin v Foltz, 773 F2d 711, 717 (6th Cir, 1985); Koontz v Glossa, 731 F2d 365, 369 (6th Cir, 1984).

In the instant case, both the Sixth Circuit and the district court correctly concluded that Petitioner was not prejudiced by the felony murder instruction. Since it was clear that a larceny had been committed, and likely that a jury would conclude that a strangulation killing was a direct result of someone acting with an intent to kill, Petitioner, by way of defense, attempted to convince the jury that he was not involved at all. This was a reasonable defense, since there were no eyewitnesses who could directly connect Petitioner with the crime. This defense was equally applica-

ble to both the premeditated murder and felony murder theories. Thus, Petitioner's constitutional rights were not violated.

B. Petitioner Was Not Denied A Fair Hearing On Ineffective Assistance Of Counsel By The Trial Judge's Refusal To Disqualify Himself.

Following Petitioner's 1983 conviction, the Michigan Court of Appeals remanded the case to the trial court for a hearing on Petitioner's claim of ineffective assistance of counsel. Previously, at sentencing on February 15, 1983, Petitioner made an oral motion for new trial in propria persona in the presence of his trial counsel. The following colloquy took place:

> "DEFENDANT: ... [A]t this time, I'd like to present an oral motion for new trial, pertaining to the case. I have several issues which support my motion.

"THE COURT: How lengthy is your motion going to be?

"DEFENDANT: It will only be a couple minutes.

"My first issue is ineffective assistance on behalf of my State Appointed lawyer, Mr. William Wolfram.

"THE COURT: The motion on that will be denied. You were very capably represented by counsel.

"DEFENDANT: I take exception to your denial.

"THE COURT: I understand that. You may appeal on that."

(Trial Tr., Vol. III, 103-104).

The judge also suggested that Petitioner could bring a formal written motion on the matter if he wished (Trial Tr., Vol. III, 104-105). An evidentiary hearing on ineffective assistance of counsel was held before the same trial judge eight months later, on October 18, 1983. Petitioner's motion for new trial was denied. Petitioner claims that the

judge's comment at sentencing that he was "very capably represented by counsel" evidenced bias and required the judge to disqualify himself from presiding at the evidentiary hearing.

To be disqualifying, alleged bias and prejudice of a judge must stem from an extrajudicial source and must result in an opinion based on something other than what the judge learned from his participation in the case. United States v Grinnell Corp., 384 US 563, 583 (1966); Bradley v Milliken, 620 F2d 1143, 1157 (6th Cir), cert den, 449 US 870 (1980); Shaw v Martin, 733 F2d 304 (4th Cir), cert den, 469 US 873, reh den, 469 US 1067 (1984). The federal standard for recusal of a judge is an objective one: whether a reasonable person, knowing all of the surrounding circumstances, would

consider the judge to be impartial. United States v Norton, 700 F2d 1072, 1076 (6th Cir), cert den, 461 US 910 (1983).

In the instant case, the trial judge's brief remark at sentencing that he thought that Petitioner was capably represented by trial counsel does not prove that his later consideration of the motion for new trial was unfair. The district court below correctly found that the judge's statement merely reflected his state of mind after presiding at the trial and in the context of a sentencing dialogue. Petitioner was not denied due process as a result of judicial bias.

C. Petitioner Was Not Denied The Effective Assistance Of Counsel.

In Strickland v Washington, 466 US 668 (1984), this Court enunciated the

standards by which to judge allegations of ineffective assistance of counsel in federal habeas corpus proceedings. Judicial scrutiny must be "highly deferential" and must begin with the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 US at 689. The burden of proof is on the petitioner to overcome the presumption of adequate assistance by identifying acts or omissions of counsel which are unreasonable in light of the facts of the particular case viewed as of the time of counsel's conduct. Id., 466 US at 690. A petitioner must show that counsel's performance was so deficient that it fell below "an objective standard of reasonableness" and was not "within the range of competence demanded of attorneys in

criminal cases." Id., 466 US at 687-688. Even after a demonstration of constitutionally deficient representation, the judgment of a criminal proceeding cannot be set aside unless the errors of counsel prejudiced the defense and were "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id., 466 US at 687.

Petitioner claims that his trial counsel was ineffective in several respects. The district court below outlined Petitioner's claims of ineffectiveness and found each to have been dealt with thoroughly in the Michigan Court of Appeals opinion. Holding the Michigan Court of Appeals opinion correct and adopting that opinion by reference, the district court rejected Petitioner's claim. The Sixth Circuit affirmed the

district court's finding that counsel was not ineffective and adopted the district court's opinion by reference.

The state and federal courts below correctly found that defense counsel conducted adequate and effective pretrial discovery; that while Petitioner was involved in the preparation of his defense, he had no constitutional right to review personally all relevant documents and evidence; that counsel's questioning of certain witnesses and failure to make certain objections at trial was valid trial strategy; and that the release of a psychiatric report concerning the Petitioner was not improper, nor did it "cause" Petitioner to decide not to testify at trial. Therefore, Petitioner was not denied the effective assistance of counsel.

RELIEF SOUGHT

For the foregoing reasons, Respondent respectfully urges that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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Supreme Court, U.S.
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No. 90-1122

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1990

JEROME GOLOCHOWICZ,

Petitioner

vs.

HENRY GRAYSON, Warden, Charles Egeler Correctional Facility,

Respondent

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Regarding Issues 1, 2 and 3.

The respondent cites numerous Supreme Court cases upholding "open murder" statutes. These cases involve the question of whether premeditated murder is charged when the prosecutor charges "open murder" or murder. None involve the question of charging murder, and not charging larceny, and then, at the end of trial, adding the charge of felony murder in the course of a larceny.

With regard to Michigan cases, the respondent cites *People v. Page*, 198 Mich. 524 (1917). In *Page*, the written charge was murder, and the conviction was for felony murder in the course of a robbery. However, in *Page*, the prosecutor repeatedly informed the defense orally in court, before and during trial, that this was a charge of felony murder in the course of a robbery. The defendant in *Page* had notice that this Petitioner did not have. *Page* is therefore nothing like this case.

Further, *Page* was decided decades before the cases recognizing the constitutional right to notice of the charge in state court criminal proceedings.

The respondent cites some Michigan cases that do not involve felony murder prosecutions at all, and are therefore irrelevant. *Brownell v. People*, 38 Mich 372 (1878) (second degree murder); *People v*

Johnson, 427 Mich 98 (1986) (second degree murder).

The respondent cites *People v McKinney*, 65 Mich App 131(1975) and *People v William Turner*, 26 Mich App 632 (1970). These cases permit the practice of charging open murder and convicting on felony murder. However, in *Turner*, the defendant was advised of the felony murder charge from his first trial (contrast the instant case, where the first trial involved premeditated murder only). In *McKinney*, the Court wrongly applied *People v Page*, even though the Court in *Page* relied on the oral notice to the defendant, which oral notice was absent in *McKinney*.

Most importantly, however, the cases of *McKinney* and*Turner* are no different than the Ohio and Nevada cases where the state courts, like in Michigan, wrongly upheld the practice of charging murder and convicting of felony murder in the course of crimes unspecified before trial.

In *Turner v. State*, 605 P.2d 1140 (Nev. 1980), the Nevada Supreme Court held: "It is permissible to instruct regarding felony murder even though felony murder is not pleaded."

Two years later, in the *Givens* case itself, the claim that it was improper to charge murder and then convict on murder by torture was rejected by the Nevada Supreme Court as being unworthy of discussion. *Givens v. State*, 655 P.2d 533 (Nev. 1982).

Similarly, Ohio courts have also approved the

practice found unconstitutional by the Sixth and Ninth Circuits in *Watson v. Jago*, 558 F.2d. 330 (6th Cir. 1977) and *Givens v. Housewright*, 786 F.2d 1378 (9th Cir. 1986). See *Bryant v. State*, 192 N.E. 795, 48 Ohio App. 208 (1933). While the *Watson* case was unreported in the Ohio state courts, it is clear that the Ohio courts approved the practice which the Sixth Circuit held to be unconstitutional.

The existence of state court cases approving the practice in question did not legalize the practice in *Watson v. Jago* or in *Givens v. Housewright*. They therefore cannot legitimize the practice here. There simply is no difference separating Michigan law from Ohio and Nevada law. All three states tried to get away with the practice employed here. Under the present ruling, Michigan can get away with it, while Ohio and Nevada cannot. This difference in the administration of justice is a compelling reason for the granting of certiorari.

Further, in this case, in contrast to the cases cited by the respondent, we have the affirmative misrepresentation by the prosecutor that the charge in the case required proof of premeditation and deliberation. No case has ever approved that sort of trickery to prevent the defendant from putting on a full defense, until now.

Respondent also cites *Blake v. Morford*, 563 F.2d 248 (6th Cir. 1977), for the proposition that "a person

can be convicted of first degree felony murder even when the indictment charges only first degree premeditated murder." (R. Br. 21). This description of *Blake* is totally inaccurate. In *Blake*, the charge was premeditated murder, and the conviction was for premeditated murder. The issue in *Blake* was whether evidence of rape and robbery was admissible to show premeditation. Admissibility of evidence is not at issue in this case. Petitioner does not claim that it was improper to introduce evidence that a larceny may have occurred.

In attempting to distinguish *Givens v. Housewright*, the repondent notes that the charge of "murder by torture" of which Givens was convicted does not require intent to kill. (Resp. Br. 21-22). However, felony murder in the course of a larceny also does not require intent to kill. *People v Aaron*, 409 Mich 672 (1980).

There simply is no reasonable basis on which to distinguish *Givens v. Housewright* from the instant case.

Respondent claims that the charge in this case was "open murder." In fact, the word "open" does not appear in any charging document. However, it would make no difference if it did appear.

M.C.L. 750.316, the first degree murder statute, contains 19 different crimes. A criminal defendant has the right to know which of the 19 are being

charged before trial starts, not after the proofs are closed. Under Respondent's theory, every time murder is charged in Michigan, defense counsel during trial has to demonstrate that the killing was not in the course of an arson or rape or burglary, simply to guard against the possibility that the prosecutor would decide at the close of proofs that felony murder in the course of an arson or a rape or burglary would be the charge.

The respondent stresses that at trial Petitioner used a defense (no proof of his involvement in the killing) which would have applied to either premeditated murder or to felony murder in the course of a larceny. (Resp. Br. 22-23). This **demonstrates** the prejudice, rather than refutes it. Because misled by the charging document, and the statements of the prosecutor, the defense did forego the opportunity to employ additional defenses which are relevant to felony murder in the course of a larceny, but are not relevant to premeditated murder.

The issue is simple: does the defendant get to know the charges before trial starts, or only after the close of proofs?

Conclusion.

Petitioner Jerome Golochowicz respectfully submits that for the reasons stated in the Petition for

Certiorari, as supplemented above, this Court should grant the Writ of Certiorari and grant either plenary consideration or summary reversal.

Respectfully submitted,

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No. 90-1122

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1990

JEROME GOLOCHOWICZ,

Petitioner

vs.

HENRY GRAYSON, Warden, Charles Egeler Correctional Facility,

Respondent

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

Regarding Issues 1, 2 and 3.

Petitioner has found new authority in support of issues 1, 2 and 3. Petitioner has relied on *Givens v. Housewright*, 786 F.2d 1378 (9th Cir. 1986). The Respondent has attempted to distinguish that case. Petitioner has argued that the attempt to distinguish is unconvincing. In any event, the Respondent's attempt to distinguish is rendered wholly ineffective by a recent Ninth Circuit case.

The Ninth Circuit has issued a decision in *Shepard v. Rees*, 909 F.2d 1234 (9th Cir. 1990).[1] This case involved a state court prosecution for murder, which was transformed at the end of trial into a charge of felony murder in the course of a robbery.

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[1] Some sources mistakenly give this opinion a 1989 date. An opinion in *Sheppard v. Rees* was issued August 25, 1989, at 883 F.2d 795. This opinion was issued and then withdrawn by the Court. Upon a motion for rehearing, the Court issued the amended ruling found at 909 F.2d 1234, on July 6, 1990. Although the 1990 ruling in the *Sheppard* case cites *Givens v. Housewright*, the citation does not appear in the 1989-1990 Supplement of Shepard's Federal Citations. The citation does not appear until the February 1991 supplement to Shepard's Federal Citations, which arrived long after the filing of petition for certiorari in this case. The case was not available when the petition was filed, and therefore is suitable for inclusion in a supplemental brief pursuant to U.S.S.Ct. Rule 15.7.

The Court had no trouble finding this to be reversible constitutional error.

The Court in *Sheppard v. Rees* noted the facts as follows:

> "In an information filed on April 20, 1981, Sheppard was charged with one count of murder under California Penal Code section 187, and with use of a firearm. He was arraigned and pleaded not guilty. The case was tried before a jury on the theory that the killing was premeditated and deliberate, precipitated by an alleged 'debt' from a cocaine transaction Sheppard felt was owed to him by the decedent. At no time during pretrial proceedings, opening statements, or the taking of testimony was the concept of felony-murder raised, directly or indirectly.
> ... [After both sides rested their proofs] the prosecution, for the first time, requested that instruciton on robbery and felony-murder be given in conjunction with those on first-degree murder. Defense counsel immediately objected to the State's request." 909 F.2d at 1235.
> ... "Because neither felony-murder nor the underlying charge of robbery was listed in the information, Sheppard argues he did not receive adequate notice to enable him to prepare a proper defense to the theory of felony-murder." 909 F.2d at 1236.

It is apparent that these facts are indistinguishable from the facts in the instant case.

The Court in *Sheppard v. Rees*, at 1237, held that the lack of notice of felony-murder and the underlying felony was a constitutional error and could not be harmless error:

> "A trial cannot be fair unless the nature of the charges against a defendant are adequately made known to him or her in a timely fashion. *See Strickland v. Washington*, 466 U.S. 668. 685, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1974) (a fair trial is 'one in which evidence subject to *adversarial testing* is presented to an impartial tribunal *for resolution of issues defined in advance of the proceeding*") (emphasis added). Here, the prosecutor "ambushed" the defense with a new theory of culpability after the evidence was already in, after both sides had rested, and after the jury instructions were settled. This new theory then appeared in the form of unexpected jury instructions permitting the jury to convict on a theory that was neither subject to adversarial testing, nor defined in advance of the proceeding.
>
> Moreover, the right to counsel is directly implicated. That right is next to meaningless unless counsel knows and has a satisfactory opportunity to respond to the

> charges against which he or she must defend. Sheppard's counsel had no occasion to defend against the felony-murder theory during the evidentiary phase of the trial. This error affected the composition of the record. *Rose* [*v. Clark*, 478 U.S. 570 (1986)] 478 U.S. at 579, n. 7, 106 S.Ct. at 3107. n. 7. Defense counsel would have added an evidentiary dimension to his defense designed to meet the felony-murder theory had he known at the outset what he was up against.
>
> Thus, it is incorrect to surmise, as did the District Court, that the error was harmless because there was an 'abundance of evidence' to support a finding of felony-murder. The defendant had no opportunity to present his own evidence on felony-murder to refute that of the prosecution."

This excerpt demonstrates that the holdings of the Ninth Circuit in *Sheppard v. Rees* and the Sixth Circuit herein are completely incompatible, and necessarily lead to differing results. The fact that *Sheppard v. Rees* and the instant case have virtually identical facts shows that the issue is one bound to reappear again and again until settled by this Court. Certiorari should therefore be granted.

Conclusion.

Petitioner Jerome Golochowicz respectfully submits that for the reasons stated in the Petition for Certiorari, as supplemented above, this Court should grant the Writ of Certiorari and grant either plenary consideration or summary reversal.

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